No. 84-249

In the Supreme Court of the United States

October Term, 1984

ROGER L. SPENCER AND SHIRLEY L. SPENCER,
PETITIONERS

v.

SOUTH CAROLINA TAX COMMISSION, CHARLES N. PLOWDEN, IN HIS CAPACITY AS A MEMBER AND AS THE CHAIRMAN OF THE SOUTH CAROLINA TAX COMMISSION, ROBERT C. WASSON, IN HIS CAPACITY AS A MEMBER OF THE SOUTH CAROLINA TAX COMMISSION AND JOHN T. WEEKS, IN HIS CAPACITY AS A MEMBER OF THE SOUTH CAROLINA TAX COMMISSION
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1. May a state court of general jurisdiction refuse to entertain a plaintiff's 42 U.S.C. § 1983 claim and thereby avoid awarding attorney's fees under 42 U.S.C. § 1988 even though the plaintiff successfully challenges in that court a state statute's validity under the United States Constitution?

2. May a state court deny attorney's fees under 42 U.S.C. §§ 1983 and 1988 on the ground that Congress did not intend §§ 1983 and 1988 to require an award of attorney's fees where a state law provides a state remedy and prohibits the award of attorney's fees?

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OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (App. A at 1a-11a.) has not yet been reported in the official reports but is reported at 316 S.E.2d 386. The opinion of the trial court (App. B at 12a-21a.) is not reported.

JURISDICTION

The opinion of the Supreme Court of South Carolina was filed on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Article VI, clause 2, (App. E at 25a.)

Tax Injunction Act of 1937: 28 U.S.C. § 1341 (App. E at 25a.)

Civil Rights Act of 1871: 42 U.S.C. § 1983 (App. E at 25a.)

Civil Rights Attorney's Fees Awards Act of 1976: 42 U.S.C. § 1988 (App. E at 26a.)

S.C. Code Ann. § 12-47-220 (App. E at 26a.)

S.C. Code Ann. § 12-47-270 (App. E at 27a.)

STATEMENT

The South Carolina Supreme Court has refused to enforce the petitioners' rights under 42 U.S.C. §§ 1983 and 1988.

The petitioners, the Spencers, have resided in North Carolina since 1977 but, in 1980, derived all their income from Mr. Spencer's job in South Carolina. When the Spencers filed for a refund of approximately $500 of South Carolina income taxes withheld for 1980, the South Carolina State Tax Commission denied their request and claimed about $100 more in taxes. The Commission's action was based on a recently enacted South Carolina statute which denied the

Spencers the right to deduct any non-business expenses against their South Carolina income because North Carolina did not permit non-residents to take similar non-business deductions against income earned in North Carolina.

The Spencers then brought a lawsuit in South Carolina state court challenging the constitutionality of the new tax statute on which the Commission had relied. They sought the money they had been forced to pay under that statute as well as their attorney's fees. They alleged, among other things, that the new tax statute violated the privileges and immunities clause, Article IV, § 2, clause 1, as well as other parts of the United States Constitution.

They brought their lawsuit in state court pursuant to the procedures specified in S.C. Code Ann. § 12-47-220 as

well as pursuant to 42 U.S.C. § 1983 and prayed for their attorney's fees under 42 U.S.C. § 1988. (App. B at 18a.) The Spencers took advantage of the availability of attorney's fees under § 1988 in order to undertake the litigation even though only about $600 was at stake. State court was the only forum reasonably available because their chances of successfully bringing the action in federal court were slim after Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100, 102 S.Ct. 177 (1981).

The Spencers prevailed in their attack on the new tax statute. The state trial court declared that the tax statute violated the United States Constitution and ordered the Commission to pay the Spencers approximately $600. The court, however, refused to entertain the Spencers' § 1983 claim and refused to

award attorney's fees under § 1988. It recognized

> that the plaintiff's [had] ... incurred attorney's fees and other expenses which probably [made] the refund ... a "tasteless" victory.

(App. B at 18a.) But it insisted, in spite of §§ 1983 and 1988, that it lacked authority to award fees because S.C. Code Ann. § 12-47-220 provided the Spencers a remedy and S.C. Code Ann. § 12-47-270 did not allow costs to be taxed to either party.

The Commission appealed the portion of the order striking down the new tax statute. The Spencers appealed from the trial court's refusal to entertain the § 1983 claim and denial of attorney's fees. On appeal, the Commission argued that the denial of attorney's fees should be affirmed for several reasons. One reason was that the trial court had no

obligation to consider the § 1983 claim because there was an adequate remedy at state law under § 12-47-220. (App. C at 22a.) In response, the Spencers contended that the federal Constitution required the trial court to consider their § 1983 claim and award them attorney's fees. (App. D at 24a.) They contended further that any state statute that purported to deny them the attorney's fees guaranteed by §§ 1983 and 1988 was invalid because that statute had to yield to §§ 1983 and 1988 under the supremacy clause of the United States Constitution. (App. D at 23a.)

The South Carolina Supreme Court affirmed the trial court in all respects. It held that the new statute was unconstitutional under the privileges and immunities clause of the United States Constitution. But it left the Spencers

with a "tasteless victory" because it recognized and affirmed the trial court's decision not to address the § 1983 claim and award attorney's fees under § 1988. (App. A at 10a-11a.)

In support of its decision to reject the Spencers' § 1983 and § 1988 claims, the state supreme court noted that this Court has not ruled that state courts must entertain § 1983 actions. (App. A at 10a.) In spite of the Spencers' contention that they had obtained only a "hollow victory," the South Carolina court concluded that §§ 1983 and 1988 may not be invoked to supplement available state remedies with attorney's fees. The court noted that S.C. Code Ann. § 12-47-270 prohibited the taxation of costs in actions pursuant to § 12-47-220 and declared that "state remedies for asserting rights may not be circumvented by invok-

ing § 1983." (App. A at 10a.) Apparently in response to the Spencers' argument that any state statute attempting to limit the remedies available under §§ 1983 and 1988 was invalid, the court asserted that Congress had not intended that §§ 1983 and 1988 be used solely "to justify the allowance of counsel fees." (App. A at 10a.)

After bearing the expense of successfully challenging the constitutionality of the statute under which they had been taxed, the Spencers were left with a recovery of only approximately $600.

REASONS FOR GRANTING THE PETITION

1. This Court has not yet considered whether a state court may refuse to entertain a substantial § 1983 action. It is clear that state courts may entertain § 1983 actions. Maine v. Thiboutot, 448 U.S. 1, 3 n.1, 100 S. Ct. 2502, 2503

n.1 (1980). But this Court has specifically left open the question of whether a state court is obligated to enforce § 1983. Id. In Martinez v. California, 444 U.S. 277, 283 n.7, 100 S. Ct. 553, 558 n.7 (1980), this Court noted the conflict between the Tennessee Supreme Court's refusal to permit state courts to entertain § 1983 actions, Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969), and the rule of Testa v. Katt, 330 U.S. 386, 393-94, 67 S. Ct. 810, 814-15 (1947), that "state courts are generally not free to refuse enforcement of [a] federal claim." But this Court left the conflict unresolved. It said

> [w]e have never considered, however, the question whether a State must entertain a claim under § 1983.

Martinez v. California, 444 U.S. at 283 n.7, 100 S. Ct. at 558 n.7. That question remains unresolved. The Court

should now grant certiorari to resolve the question. It is presented squarely in this case. The confusion regarding it has increased, and important national policies are threatened by that confusion.

2. State courts conflict as to whether they are obliged to entertain § 1983 actions. By its decision in the case under review, the South Carolina Supreme Court has joined other state courts which have refused to entertain § 1983 actions. The decisions of these courts conflict with those of the courts of other states which have recognized their obligation under the United States Constitution to enforce § 1983 as well as § 1988. The South Carolina decision also conflicts with decisions of the great majority of state courts which have accepted § 1983 claims without considering whether they

were obligated to do so.

Among the courts refusing to entertain § 1983 claims, Tennessee and South Carolina have rejected § 1983 the most broadly. The Supreme Court of Tennessee has forbidden Tennessee courts from entertaining any § 1983 action. It has declared that

> it would be illogical indeed to hold that a State court should enforce, or is required to enforce [§ 1983].

Chamberlain v. Brown, 442 S.W.2d at 252.

In the instant case, the South Carolina Supreme Court rejected § 1983 claims nearly as completely as did the Tennessee court. The South Carolina court concluded that South Carolina courts should not entertain a § 1983 action when § 1983 supplements available state remedies.[1] Its decision focused

[1]The court declared that "[s]tate remedies for asserting rights may not be circumvented by invoking § 1983." (App. A at 10a.)

particularly on the attorney's fees provided by § 1988 and not available under state law. It then declared that

> it may reasonably be inferred that the sole reason for alleging § 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress when it enacted §§ 1983 and 1988.

(App. A at 10a.)[2]

Because South Carolina state courts may not now entertain § 1983 actions when § 1983 supplements available state remedies, South Carolina courts are now closed to most § 1983 claims. The South Carolina court's ruling has this effect because attorney's fees are available in

[2]The South Carolina Supreme Court cited Brown v. Hornbeck, 54 Md. App., 458 A.2d 900 (1983) for this proposition; why it did so is uncertain. Attorney's fees were denied in Brown v. Hornbeck, because the plaintiffs did not have a substantial federal claim. Maryland state courts do entertain substantial § 1983 actions. DeBleecker v. Montgomery County, 48 Md. App. 455, 427 A.2d 1075 (1981), rev'd on other grounds, 292 Md. 498, 438 A.2d 1348 (1982). The Spencers not only had a substantial federal claim, but they prevailed on it.

any § 1983 action, Maine v. Thiboutot, 448 U.S. at 9, 100 S. Ct. at 2507, but attorney's fees are not normally available in actions in South Carolina state courts.[3]

The extent to which other state courts have rejected jurisdiction over §1983 claims is less clear. In City of North Miami v. Schy, 408 So. 2d 670 (Fla. Dist. Ct. App. 1981) the Florida court affirmed a lower court's refusal to accept a § 1983 action. It provided no explanation for its position except a reference to the portions of Thiboutot and Martinez which note that this Court

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[3]"As a general rule, attorney's fees are not recoverable unless authorized by contract or statute." Hegler v. Gulf Insurance Co., 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978). The South Carolina legislature has, by statute, authorized trial courts to award attorney's fees only in a few specific contexts. See e.g., the South Carolina Uniform Securities Act, S.C. Code Ann. § 35-1-1490, and the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140.

has not considered whether a state court must enforce § 1983.

The Georgia Supreme Court has also rejected § 1983 actions but only in one specifically defined context.[4] In Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976), the Georgia court refused to permit state procedures for equalizing taxes to be circumvented by a § 1983 suit. The court held that a § 1983 action is not available in Georgia state courts when "founded only on the claim that the assessments are unequal." Id. 224 S.E.2d at 374.

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[4]The Georgia court also rejected a putative § 1983 claim in Deriso v. Cooper, 246 Ga. 540, 272 S.E.2d 274, 277 (1980). But the § 1983 claim apparently had no substance. The court held only that state remedies could not be circumvented merely by a mention of § 1983 in the absence of a substantial § 1983 claim. The rights on which the case was based appear to have arisen solely from state law, with the possible exception of a racial discrimination claim which the court ruled belonged before a federal court already considering a similar claim.

The Mississippi Supreme Court has limited plaintiffs' ability to bring certain § 1983 cases by imposing an exhaustion requirement. But it has not refused altogether to entertain those cases. It has concluded that "state courts have jurisdiction of 1983 actions concurrent with federal courts....[but] the exhaustion of state remedies rule is applicable in actions brought under section 1983 to enjoin, suspend or restrain the assessment, levy or collection of taxes because of [28 U.S.C. 1341, the Tax Injunction Act]." State Tax Commission v. Fondren, 387 So. 2d 712, 723 (Miss. 1980), cert. denied, 450 U.S. 1040 (1981)[5].

[5]In reaching its decision, the Mississippi court did not have the benefit of the discussion of exhaustion requirements in Patsy v. Board of Regents, 457 U.S. 496, 102 S. Ct. 2557 (1982).

Unlike the Georgia and Mississippi decisions, the South Carolina court's decision is not confined to state tax cases. Although the case involved a successful constitutional attack on a tax statute, the court did not refuse the § 1983 claim because of problems unique to taxation. The court rejected § 1983 because it supplemented state remedies by providing attorney's fees under § 1988. As discussed above, § 1983 supplements available state remedies in the same way in most cases. Although it cited Backus, the Georgia decision involving tax assessments discussed above, the South Carolina Supreme Court made no attempt to limit its discussion to tax cases. The South Carolina court ruled broadly. Its decision closes South Carolina courts to most § 1983 actions. (See 11-13 supra.)

In contrast to the South Carolina Supreme Court, the courts of at least five other states have declared that their state courts must accept jurisdiction over § 1983 claims. Of those courts, the Supreme Court of Wisconsin in Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977), has provided the most thorough analysis of the question. After considering Article VI, clause 2 of the United States Constitution, the legislative history of § 1983, and numerous opinions of this Court, including Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810 (1947), the court concluded that Wisconsin state courts

> have jurisdiction to hear and decide Sec. 1983 cases. In addition, they have an affirmative obligation under the Constitution of the United States to take jurisdiction whether or not the federal right asserted is pendent to a state claim.

Terry v. Kolski, 254 N.W.2d at 712.

Courts of Alabama, New York, Indiana, and California have also acknowledged the obligation to entertain § 1983 claims, although the rationale of these state court decisions have not been as clearly expressed.[6]

The approach of the South Carolina Supreme Court also conflicts with that of the vast majority of state courts which

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[6]See Terrell v. City of Bessemer, 406 So. 2d 337, 340 (Ala. 1981) ("courts of this state must accept jurisdiction over claims brought under 42 U.S.C. § 1983 if a § 1983 plaintiff selects a state court as his forum."); Felder v. Foster, 107 Misc. 2d 782, 436 N.Y.S.2d 675, 677 (N.Y. Sup. Ct. 1981) ("This court has jurisdiction to entertain all proceedings brought under sections 1983 and 1988... and must exercise that jurisdiction when such a proceeding is properly before it (Testa v. Katt....)"); Colvin v. Bowen, 399 N.E.2d 835, 837 (Ind. Ct. App. 3rd Dist. 1980) ("[S]tate courts of general jurisdiction are not free to deny enforcement of claims growing out of a valid federal statute such as § 1983."); Brown v. Pitchess, 119 Cal. Rptr. 204, 531 P.2d 772, 775 (Cal. 1975) (en banc) ("'the existence of [concurrent] jurisdiction creates the duty to exercise it....it is unlikely that this decision will precipitate a 'flood of litigation in California courts.'")

have freely recognized concurrent jurisdiction over § 1983 claims.[7] Many of these courts have also expressly recognized the obligation to award attorney's fees under § 1988.[8]

One of these courts, the Massachusetts Supreme Judicial Court, has

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[7]These cases are collected in Appendix F at 28a.

[8]See, e.g.: Stratos v. Department of Public Welfare, 387 Mass. 312, 439 N.E.2d 778, 783-85 (1982); Johnson v. Blum, 58 N.Y.2d 454, 448 N.E.2d 449, 450-451 (1983) (Fee must be awarded absent "special circumstances"); Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 340 N.W.2d 704, 711, 714 (1983) (award of damages and attorney's fees affirmed even though it exceeded state law limitation on municipal liability); Ward Lumber Co. v. Brooks, 50 N.C. App. 294, 273 S.E.2d 331, 333 (1981). ("it is not necessary that the court base its decision on § 1983 in order for the prevailing party to be entitled to attorney's fees under.... § 1988"); Davis v. Everett, 443 So.2d 1232, 1235, (Ala. 1983); Caputo v. City of Chicago, 113 Ill. App. 3d 45, 446 N.E.2d 1240, 1242 (1983) (denied fees but recognized that proper § 1983 claims may be brought in state court and "fees authorized under 42 U.S.C. § 1988 are an appropriate part of the remedy in such cases.")

squarely rejected the rationale adopted by the Supreme Court of South Carolina. In Stratos v. Department of Public Welfare, 387 Mass. 312, 439 N.E.2d 778 (1982), the defendant contended that the § 1983 claim should be disregarded as "superfluous" because the remedy sought was available under state law. The defendant contended further that the § 1983 claim was "an unnecessary afterthought, appended to the case as a 'hook' on which to hang an award of attorney's fees." The Supreme Judicial Court recognized the fallacy of the defendant's argument and dismissed it saying:

> Section 1983 provides an independent remedy for violation of rights protected by Federal law. If such a right is at issue, the § 1983 remedy is available, even if the State has also provided a means of obtaining relief....The fee incentive is equally useful and necessary whether the right in question is secured by Federal law alone or by State law as well. Therefore, the fact that a

> plaintiff claiming relief under § 1983 could have obtained relief solely by means of a state remedy - even a 'routine' one - does not foreclose a fee award.

439 N.E.2d at 783.

3. The South Carolina Court has undermined the congressional policy embodied in §§ 1983 and 1988. By refusing to permit §§ 1983 and 1988 to be used as a way of supplementing state remedies with attorney's fees, the South Carolina Supreme Court has refused to implement the command of Congress. This Court noted long ago in Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482 (1961), overruled on other grounds 436 U.S. 658, 98 S. Ct. 2018 (1978), that § 1983 has provided a remedy that "is supplementary to the state remedy." Section 1983 cannot be avoided simply because "the State has a law which if enforced would give relief." Id. The state remedy "need not

be first sought and refused before... [§ 1983] is invoked." Id.

Both §§ 1983 and 1988 were enacted "to benefit those claiming deprivations of constitutional and civil rights." Maine v. Thiboutot, 448 U.S. at 9, 100 S. Ct. at 2507. Awards of attorney's fees under § 1988 are "'an integral part of the remedies necessary to obtain' compliance with § 1983." Id. 448 U.S. at 11, 100 S. Ct. at 2508 quoting S. Rep. No. 94-1011, p. 5 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913. By refusing to entertain the Spencers' § 1983 claim and award attorney's fees, the South Carolina court has denied them an essential remedy to which they have a right under §§ 1983 and 1988.

Congress enacted § 1988 because it was concerned that the prospect of a hol-

low victory would prevent the vindication of constitutional rights. The Senate report on the attorney's fees portion of § 1988 noted that

> [i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, p. 2 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910. The Senate Report concluded that

> [i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 94-1011 at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 5908, 5913.

The South Carolina Supreme Court's decision renders § 1983 no more than a "hollow pronouncement" for the Spencers and other plaintiffs with similar claims. The South Carolina court itself acknowledged in its opinion that the Spencers might have obtained only a "hollow victory." (App. A at 9a.) As long as the state courts are permitted to refuse to supplement state remedies with the attorney's fees provided by §§ 1983 and 1988, it will be difficult for many private citizens to enforce their constitutional rights. The problem is serious and requires this Court's consideration.

4. The South Carolina Supreme Court's decision is inconsistent with several decisions of this Court. This Court has repeatedly reversed attempts by state courts to refuse to consider claims aris-

ing under federal law. In Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 32 S. Ct. 169 (1912), this Court held that a state court had a duty to hear the federal claims properly brought before it, even if the federal statutes on which those claims were based conflicted with the state's own policy. This Court stated that a state court "is just as much bound to recognize [the laws of the United States] as operative within the State as it is to recognize the state laws" and "[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." Ibid., 223 U.S. at 58. This Court concluded "that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdic-

tion, as prescribed by local laws, is adequate to the occasion." [emphasis supplied] Ibid., 223 U.S. at 59.

The unmistakable message of the Mondou case has been reaffirmed several times by this Court. In McKnett v. St. Louis & S.F.RY. Co., 292 U.S. 230, 54 S. Ct. 690 (1934), this Court again rejected a state court's refusal to hear a federal claim:

> [T]he Federal Constitution prohibits state courts of general jurisdiction from refusing to [hear a case] solely because the suit is brought under a federal law.... A state may not discriminate against rights arising under federal laws.

54 S. Ct. at 692.

Of similar effect is the case of Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810 (1947). There, this Court noted that the states' obligation to enforce federal laws "is not lessened by reason of the form in which they are cast or the remedy

which they provide." 330 U.S. at 391. The court declared that when a state court has jurisdiction "adequate and appropriate under established local law," 330 U.S. at 394, its refusal to enforce a plaintiff's federal claim "flies in the face of the fact that the States of the Union constitute a nation" and disregards the purpose and effect of the Supremacy Clause of the Constitution. Ibid. 330 U.S. at 389.

This line of cases makes clear that the South Carolina state court's refusal here to entertain the Spencers' § 1983 claim was erroneous. There can be no question that the South Carolina trial courts have jurisdiction "adequate to the occasion" of deciding a § 1983 claim. Article V, Section 7 of the South Carolina Constitution provides that "[t]he Circuit Court shall be a general

trial court with original jurisdiction in civil and criminal cases...." Furthermore, the claims made and remedies sought in the Spencers' lawsuit are the sorts of claims and remedies with which the South Carolina trial courts are amply familiar. South Carolina trial courts grant monetary judgments on a daily basis. S.C. Code Ann. § 15-53-20 expressly authorizes the state trial courts to grant declaratory relief in appropriate cases. In some contexts, state statutes permit the trial courts to award reasonable attorney's fees. See p. 13, footnote 3 supra. In short, like the state courts in the Mondou, McKnett and Testa cases, the state court here had no legitimate reasons for refusing to entertain the federal cause of action. The South Carolina Supreme Court's decision in this case, therefore, directly contradicts this

Court's decisions in the Mondou, McKnett and Testa cases.

5. By denying attorney's fees, the South Carolina court's opinion leaves many victims of unconstitutional state taxation and other violations of federal rights without any practical remedy. The ability to collect attorney's fees is vital to the enforcement of constitutional rights when small amounts of money are at stake. In this case, the Spencers lost $585 as a result of the enforcement of a state statute which they have successfully attacked. Many other taxpayers may have lost similar amounts. But, as the trial judge remarked, the Spencers' victory is "tasteless" to them because of the expenses and attorney's fees involved in maintaining an action such as this. (App. B at 18a.)

The Spencers reside and vote in

North Carolina although they must pay taxes in South Carolina. A § 1983 suit in state court coupled with a request for attorney's fees under § 1988 is the only practical way for taxpayers like the Spencers to attack an unconstitutional South Carolina tax statute. For such a case, the federal courts are not available. The principles of comity and 28 U.S.C. § 1341 have effectively closed the federal courts to actions like this one, even when brought under § 1983. See Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100, 102 S. Ct. 177 (1981).[9]

[9] McNary did not actually decide whether a § 1983 action attacking a state tax law but not requiring scrutiny of tax assessment practices may be brought in federal court. See McNary 454 U.S. at 107 n.4, 102 S. Ct. at 181 n 4. Nevertheless, the risk of being unable to bring such an action in federal court after McNary is great enough to discourage plaintiffs with small claims from incurring the cost of attempting to proceed in federal court.

In the absence of §§ 1983 and 1988, state procedures would also effectively bar claims like the Spencers'. Taxpayer class actions are generally not permitted in South Carolina state courts.[10] Costs and attorney's fees are not available under state law to those who successfully challenge a South Carolina tax statute. See S.C. Code Ann. § 12-47-270 and p. 13 footnote 3 supra.

A § 1983 suit in state court is also the only available practical remedy for those who have been deprived of federal rights in other contexts but, due to individual financial or logistical problems, are barred from federal court. Constitutional litigation against a state is often costly. If one cannot bring a § 1983 suit in state court and obtain

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[10] See Long v. Seabrook, 260 S.C. 562, 567-68, 197 S.E.2d 659, 661-62 (1973).

attorney's fees under § 1988, the cost of litigating modest claims, like the Spencers', will often cause the claim not to be litigated at all.

If the South Carolina Supreme Court's decision stands, the state will be free to extract small amounts from many people unconstitutionally. Those who act under the color of state law will also be made more free to deny federal rights in countless ways. The victims, especially if they are politically powerless non-residents like the Spencers, will not be able to protect themselves.

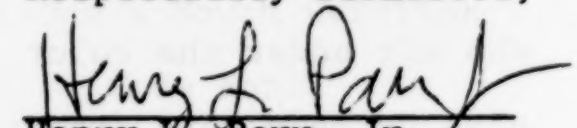
CONCLUSION

Review of the opinion below is necessary to end the confusion regarding the important issues presented and to ensure that state courts do not undermine the important congressional policy

embodied in 42 U.S.C. §§ 1983 and 1988. Petitioners respectfully request the issuance of a writ of certiorari to the Supreme Court of South Carolina to consider the questions presented together with all subsidiary questions fairly included therein.

Respectfully submitted,

August 13, 1984



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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roger L. Spencer and Shirley L. Spencer,
.....Respondents-Appellants,

v.

South Carolina Tax Commission, Charles N. Plowden, in his capacity as a member and as the Chairman of the South Carolina Tax Commission, Robert C. Wasson, in his capacity as a member of the South Carolina Tax Commission and John T. Weeks, in his capacity as a member of the South Carolina Tax Commission,
.....Appellants-Respondents

Appeal From Greenville County
Wylie H. Caldwell, Jr., Special Judge

OPINION NO. 22105
Heard April 3, 1984 - Filed May 15, 1984

AFFIRMED

HARWELL, A. J.: The taxpayers, Mr. and Mrs. Roger L. Spencer, paid their 1980 South Carolina income taxes under protest and initiated this action for a refund. The trial judge granted the refund but

denied attorneys' fees. We affirm.

The Spencers are North Carolina residents, but Mr. Spencer, the sole wage-earner, is employed in Greenville, South Carolina. The Spencers filed a joint return and claimed nonbusiness deductions for federal, state, and local taxes; interest; and charitable contributions. The Tax Commission disallowed the deductions pursuant to the proviso to S. C. Code Ann. §12-7-750 (1983).

This appeal involves the construction and constitutionality of §12-7-750. The statute provides:

> In the case of a nonresident individual the deductions allowed in §12-7-700, 12-7-710 and 12-7-740 shall be allowed only if, and to the extent that, they are connected with income arising from sources within the State and the proper apportionment and allocation of the deductions with respect to sources of income within and without this State shall be determined under rules and regulations prescribed by the Commission.

> Provided, however, that a nonresident individual shall not be permitted to apportion and allocate his nonbusiness deductions between this State and his state of principal residence unless his state of principal residence also permits similar apportionment and allocation of nonbusiness deductions by nonresident individuals filing returns in that state. The South Carolina Tax Commission shall promulgate necessary regulations to effectuate the provisions of this proviso.

The trial court held that the proviso to §12-7-750 violated the Privileges and Immunities Clause of the United States Constitution, Article IV, §2, Cl. 1.

The Tax Commission contends on appeal to this Court that the statute can be given a constitutional construction. It asserts that, under the first paragraph, nonresidents filing in South Carolina are allowed to claim only business deductions and that this limitation does not violate the Privileges and Immunities Clause. In support of this position, the Commission

cites Stiles v. Currie. 254 N. C. 197, 118 S. E. 2d 428 (1961); Berry v. State Tax Comm'n, 241 Or. 580, 397 P. 2d 780 (1964), appeal dismissed, 382 U. S. 16 (1965); and Goodwin v. State Tax Comm'n, 286 App. Div. 694, 146 N. Y. S. 2d 172 (1955), aff'd mem. 133 N. E. 2d 711, appeal dismissed 352 U. S. 805 (1956).

The Commission asserts that the proviso therefore aids rather than penalizes nonresidents since it allows nonresidents to claim nonbusiness deductions under circumstances of reciprocity.

We reject this construction. The Commission's regulations prior to this lawsuit construed Paragraph 1 of §12-7-750 to allow nonresident taxpayers both business and nonbusiness deductions prorated in the ratio of their South Carolina Adjusted Gross Income to their total Adjusted Gross Income. After the proviso's enactment, prior to this lawsuit, the Commission began to disallow nonbusiness deductions in situations where the state of the taxpayer's residence lacked reciprocal legislation.

The Commission's attempt to change its interpretation of the statute is not persuasive. Where the administrative construction of a statute has been uniform and has been acquiesced in by the General Assembly, such construction is entitled to weight. Etiwan Fertilizer Co. v. S. C. Tax Comm'n, 217 S. C. 354, 60 S. E. 2d 682 (1950). We agree with the Commission's initial construction of the statute.

We must now determine whether the proviso violates the Privileges and Immunities Clause.

Application of the Privileges and Immunities Clause to an instance of dis-

crimination against out-of-state residents entails a two-step inquiry.[1] United Building and Constr. Trades Council v. City of Camden, 52 U. S. L. W. 4187 (February 21, 1984). The Court must first decide whether the statute burdens one of the privileges and immunities protected by the Clause. One of the most fundamental privileges which the Clause guarantees to citizens of a state is that of doing business in another state on terms of substantial equality with the citizens of that state. Id., See also Hicklin v. Orbeck, 437 U. S. 518 (1978); Austin v. New Hampshire, 420 U. S. 656 (1975); Mullaney v. Anderson, 342 U. S.

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[1]The terms "citizen" and "resident" are "essentially interchangeable" for purposes of analyzing cases under the Privileges and Immunities Clause. Austin v. New Hampshire, 420 U. S. 656, 662, n.8 (1975).

415 (1952); Toomer v. Witsell, 334 U. S. 385 (1948). The discrimination against nonresident taxpayers in the case at bar clearly burdens their privilege of earning a living in the neighboring state of South Carolina.

We must next address the more difficult question of whether substantial reasons justify the discrimination and whether the degree of discrimination bears a close relationship to those reasons. The State must show that nonresidents are a peculiar source of the evil at which the statute is aimed. Toomer v. Witsell, supra. State tax classifications are ordinarily accorded deference. However, when the Privileges and Immunities Clause is implicated, the classification must fall if it has the effect of retaliating against citizens of other states who have no representation in the taxing state's

legislative halls. Austin v. New Hampshire, supra; Travis v. Yale & Towne Mfg. Co., 252 U. S. 60 (1920).

The appellant asserts that the proviso to §12-7-750 is not retaliatory but is designed to encourage sister states to enact legislation favoring South Carolina residents.[2] However, the goal of encouraging other states to enact reciprocal legislation does not bear a substantial relationship to the result of penalizing taxpayers like the Spencers who live in North Carolina and work in South Carolina. These taxpayers are not the source of the evil sought to be remedied by our legislature.

The Privileges and Immunities Clause was intended to prevent retaliation and

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[2]In 1981, North Carolina enacted reciprocal legislation. 1981 N. C. Session Laws, Chapter 973, §§1, 2.

promote federalism. Therefore, denying nonresidents nonbusiness deductions initially allowed by the first paragraph of §12-7-750 and allowed for South Carolina residents who work in the State violates the Privileges and Immunities Clause.

It is not necessary to discuss the taxpayers' equal protection, due process, and commerce clause allegations.

The taxpayers next assert that they have attained only a hollow victory because the trial court refused to award them attorneys' fees. Code §12-47-270 provides, with limited exceptions, that in actions brought under §§12-47-220 or 12-47-230 no costs or disbursements shall be taxed in favor of either party. However, 42 U.S.C. § 1988 allows attorneys' fees to prevailing parties in 42 U.S.C. §1983 actions, in the trial court's

discretion.

The trial court did not address the § 1983 claim. The United States Supreme Court has not ruled that state courts are required to open their doors to § 1983 actions. See Martinez v. State of California, 444 U. S. 277 (1980); Maine v. Thiboutot, 448 U. S. 1 (1980). Section 1983 does not provide for any substantive rights; it is remedial. Chapman v. Houston Welfare Rights Organizations, 441 U. S. 600 (1979). State remedies for asserting rights may not be circumvented by invoking § 1983. Backus v. Chilivis, 236 Ga. 500, 224 S. E. 2d 370 (1976). It may reasonably be inferred that the sole reason for alleging § 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress when it enacted §§ 1983 and 1988. Brown

v. Hornbeck, 54 Md. App. 404, 458 A. 2d 900 (1983).

The decision of the trial court is, accordingly,

AFFIRMED.

LITTLEJOHN, C.J., NESS and GREGORY, JJ., and J. Woodrow Lewis, Acting Associate Justice, concur.

APPENDIX B

THE STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
81-CP-23-3844

Roger L. Spencer and Shirley L. Spencer,
Plaintiffs

v.

South Carolina Tax Commission, Charles N. Plowden, in his capacity as a member and as the Chairman of the South Carolina Tax Commission, Robert C. Wasson, in his capacity as a member of the South Carolina Tax Commission and John T. Weeks, in his capacity as a member of the South Carolina Tax Commission,
Defendants

ORDER-October 29, 1982

Plaintiffs seek a refund of taxes paid under protest to the Defendants for the tax year 1980. The facts as I hereafter find them to be are undisputed. The success or failure of the claim depends upon my conclusions of law. For that reason, at the time appointed for the hearing on this matter no testimony was needed.

Necessary exhibits were placed in evidence and lengthy arguments were made by counsel for both parties. Briefs have been filed, and I have considered them fully. I find the following to be the salient facts of this case:

FINDINGS OF FACT

Plaintiffs are residents of North Carolina. The taxes in question were for the year 1980. The Plaintiffs resided in North Carolina during that entire year and their total income was earned in South Carolina. When the Plaintiffs filed their tax returns with the Defendants for the year 1980, they claimed Eight Thousand Three Hundred Ninety and 16/100 ($8,390.16) Dollars as itemized personal deductions on their Form 1001. The Defendants notified them that the deductions would not be allowed and that as a result the Plaintiffs owed One

Thousand Five Hundred Fifty-six and 78/100 ($1,556.78) Dollars. The disallowance was based upon the fact that in that year North Carolina would not allow a South Carolina resident who earned income in North Carolina to claim those nonbusiness deductions on their North Carolina tax returns as a result of a North Carolina statute and its implementation by the Secretary of Revenue. §105-147(18)a General Statutes, North Carolina. §12-7-750 of the South Carolina Code of Laws of 1976, as amended, in its second paragraph provides as follows:

> "Provided, however, that a nonresident individual shall not be permitted to apportion and allocate his state of principal residence unless his state of principal residence also permits similar apportionment and allocation of nonbusiness deductions by nonresident individuals filing returns in that state. The South Carolina Tax Commission shall promulgate necessary regulations to

> effectuate the provisions of this proviso."

Upon the basis of that statute the deductions were disallowed. The Plaintiffs owed Five Hundred Ninety-three and 31/100 ($593.31) Dollars. They paid that amount under protest by paying the difference in what had already been withheld and the amount of the alleged tax and advising the Defendants of their protest.

CONCLUSIONS OF LAW

This Court has jurisdiction of this matter under §12-47-220 of the 1976 Code of Laws of South Carolina, as amended. The Plaintiffs have met the criteria for bringing this action and the Defendants' arguments to the contrary are without merit.

Although the Defendants denied the deductions in question upon the grounds I have previously stated in the Findings of

Fact, after the lawsuit was instituted the defense changed to an attempt to interpret the first paragraph of §12-7-750 in a manner totally different from the Defendants' interpretation of previous years and different from its interpretation as evidenced by its Form 1001-F.

That paragraph simply means that nonresident taxpayers take that proportion of their total nonbusiness deductions as their South Carolina adjusted gross income bears to their total adjusted gross income. In the case of Plaintiffs, all their income is South Carolina income, so all nonbusiness deductions should be allowed under this statute.

The only basis upon which the deductions could be disallowed is the second paragraph of §12-7-750, and it is upon that basis that the disallowance was

originally made.

Plaintiffs argue that the second paragraph of §12-7-750 is unconstitutional under both the South Carolina and United States Constitution. I have made a diligent effort to decide this case without reaching the constitutional issue. That issue is unavoidable. The paragraph in question denies a nonresident deductions available to a resident and available to a nonresident if his resident state allows similar treatment to nonresidents earning income in his state of residence. It is an unequal treatment of nonresident taxpayers as compared to resident taxpayers and as such is a violation of Article IV, §2 cl. 1 of the United States Constitution. Austin-vs-New Hampshire, 420 US 656, 95 S. Ct. 1191, 1197 (1975); Travis-vs-Yale & Towne Mfg. Co., 252 US 60, 40 S. Ct. 228 (1920). The second paragraph

of §12-7-750 of the 1976 Code of Laws of South Carolina, as amended, is therefore unconstitutional and the Five Hundred Ninety-three and 31/100 ($593.31) Dollars paid under protest by the Plaintiffs should be refunded forthwith.

Plaintiffs have consolidated actions under §12-47-220 of the 1976 South Carolina of Laws and an action under 42 USC 1983 and 1988. My conclusion is that §12-47-220 clearly provides a remedy to the Plaintiffs, and they have been successful in seeking that remedy as a result of this order. §12-47-220 clearly provides that no costs shall be taxed or allowed either party. I recognize that the Plaintiffs have incurred attorneys fees and other expenses which probably make the refund of their Five Hundred Ninety-three and 31/100 ($593.31) Dollars a "tasteless victory". That is frequent-

ly if not always the case in lawsuits for refund of taxes whether state or federal. Our legislature having limited the recoverable amount to the tax in question, it is not within the province of this Court to award attorneys fees or costs. It is therefore

ORDERED, that the Treasurer of the State of South Carolina pay to the Plaintiffs the sum of Five Hundred Ninety-three and 31/100 ($593.31) Dollars. It is further

ORDERED, that the second paragraph of §12-7-750 of the 1976 Code of Laws, as amended, is hereby declared unconstitutional and as a result of this order is null, void and of no effect.

AND IT IS SO ORDERED.

FLORENCE, SOUTH CAROLINA

OCTOBER 29, A. D. 1982.

/s/WYLIE H. CALDWELL, JR.,
PRESIDING JUDGE

THE STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
81-CP-23-3844

Roger L. Spencer and Shirley L. Spencer,
Plaintiffs

v.

South Carolina Tax Commission, Charles N. Plowden, in his capacity as a member and as the Chairman of the South Carolina Tax Commission, Robert C. Wasson, in his capacity as a member of the South Carolina Tax Commission and John T. Weeks, in his capacity as a member of the South Carolina Tax Commission,
Defendants

AMENDED ORDER-November 9, 1982

WHEREAS, the original order in the above matter, dated October 29, 1982, found the amount of taxes in dispute to be Five Hundred Ninety-three and 31/100 ($593.31) Dollars and it has been brought to the Court's attention by counsel for the Plaintiffs that the amount in dispute should have been Five Hundred Eighty-five and 00/100 ($585.00) Dollars; and

WHEREAS, the attorneys for the Defendants agree that Five Hundred Eighty-five and 00/100 ($585.00) Dollars is the correct amount in dispute. It is therefore

ORDERED, that the Order dated October 29, 1982 be and it is hereby amended to correct this error and the South Carolina Tax Commission shall pay that amount to the Petitioners.

AND IT IS SO ORDERED.

FLORENCE, SOUTH CAROLINA

NOVEMBER 9, A. D. 1982.

/s/ WYLIE H. CALDWELL, JR.,
PRESIDING JUDGE

APPENDIX C

ADDITIONAL SUSTAINING GROUNDS OF APPELLANTS/RESPONDENTS #4; TRANSCRIPT OF RECORD ON APPEAL TO THE SOUTH CAROLINA SUPREME COURT, PAGES 160-61

4. The Trial Court correctly concluded attorneys' fees are not allowable but should have so concluded on the basis of an additional sustaining ground, such additional sustaining ground being that the existence of an adequate remedy and relief under §12-47-220 allows the Trial Court not to consider an additional cause of action under 42 U.S.C. 1983.

APPENDIX D

EXCEPTIONS OF RESPONDENTS/APPELLANTS #2 AND #3; TRANSCRIPT OF RECORD ON APPEAL TO THE SOUTH CAROLINA SUPREME COURT, PAGES 161-62

2. The Trial Court committed error in ruling as a matter of law that the Plaintiffs were not entitled to costs and their reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988, in that, to the extent 42 U.S.C. § 1988 is inconsistent with § 12-47-270, the latter statute must yield under the Supremacy Clause of and the Fourteenth Amendment to the United States Constitution, and the Trial Court's conclusion that Section 12-7-750 violates Article IV, Section 2, Clause 1 of the United States Constitution necessarily means that Section 12-7-750 violates 42 U.S.C. § 1983.

3. The Trial Court committed error in ruling as a matter of law that the Plaintiffs were not entitled to costs and their reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988, in that the Supremacy Clause of and the Fourteenth Amendment to the United States Constitution prohibit the courts of the State of South Carolina from holding that a person may not assert a claim under 42 U.S.C. § 1983 in the courts of the State of South Carolina when another remedy exists under state law, particularly where the state law remedy does not provide the same scope of relief as does 42 U.S.C. §§ 1983 and 1988, and the Trial Court's conclusion that Section 12-7-750 violates Article IV, Section 2, Clause 1 of the United States Constitution necessarily means that Section 12-7-750 violates 42 U.S.C. § 1983.

APPENDIX E

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI, Clause 2 of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of section... 1983...of this title...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

S.C. Code Ann. § 12-47-220 provides:

> Any person paying any taxes under protest may at any time within thirty days after making such payment, but not afterwards, bring an action against the county treasurer or the Commission, as the case may be, for the recovery thereof, in the case of a county treasurer in the court of common pleas for the county in which such taxes were payable and in the case of the Commission in any county having jurisdiction, and, if it be determined in such action that such taxes and penalties, if any, were wrongfully or illegally collected for any reason going to the merits, the court before whom the case is tried shall certify of record that such taxes were wrong-

> fully collected and ought to be refunded and thereupon the county treasurer shall refund the taxes and penalties, if any, so paid to him or, in the case of any taxes levied or assessed by the Commission shall issue its order to the State Treasurer to refund such taxes and penalties, if any, so paid, which shall be paid in preference to other claims against the State Treasury.

S.C. Code Ann. §12-47-270 provides:

> In any action brought under the provisions of § 12-47-220 or 12-47-230, no costs or disbursements shall be taxed or allowed in favor of either party, except for the service of process and procuring the attendance of witnesses.

APPENDIX F

STATES WHICH HAVE RECOGNIZED CONCURRENT JURISDICTION OVER § 1983 CLAIMS

Arizona - New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 367, 519 P.2d 169, 176 (1974);

Colorado - Espinoza v. O'Dell, 633 P.2d 455, 460 n.2 (Colo. 1981);

Connecticut - Vason v. Carrano, 31 Conn. Sup. 338, 330 A.2d 98 (1974);

District of Columbia - Long v. District of Columbia, 469 F.2d 927, 937 (D.C. Cir. 1972);

Illinois - Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E.2d 110, 114 (1974);

Kansas - Cooper v. Hutchinson Police Department, 6 Kan. App. 2d 806, 636 P.2d 184, 186 (1981);

Kentucky - Scott v. Campbell County Board of Education, 618 S.W.2d 589, 590 (Ky. 1981);

Louisiana - Ricard v. State, 390 So.2d 882, 883-84 (La. 1980);

Maine - Thiboutot v. State, 405 A.2d 230, 235 (Me. 1979), aff'd, 448 U.S. 1 (1980);

Maryland - De Bleecker v. Montgomery County, 48 Md. App. 455, 427 A.2d 1075, 1077 (1981), rev'd on other grounds, 292 Md. 498, 438 A.2d 1348 (1982);

Massachusetts - Santana v. Registrars of Voters of Worcester, 425 N.E.2d 745, 749 (Mass. 1981);

Michigan - Dickerson v. Warden, Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841, 843 (1980);

Missouri - Shapiro v. Columbia Union National Bank and Trust Co., 576 S.W.2d 310, 316 (Mo. 1978), cert. denied, 444 U.S. 831 (1979);

New Hampshire - MBC, Inc. v. Engel, 119 N.H. 8, 397 A.2d 636, 637 (1979);

New Jersey - Endress v. Brookdale Community College, 144 N.J. Super. 109, 364 A.2d 1080, 1092 (1976);

North Carolina - Snuggs v. Stanly County Department of Public Health, 63 N.C. App. 86, 303 S.E.2d 646, 647 (1983);

North Dakota - Kristensen v. Strinden, 343 N.W.2d 67, 71 (N.D. 1983);

Ohio - Jackson v. Kurtz, 65 Ohio App. 2d 152, 416 N.E.2d 1064, 1067 (1979);

Oklahoma - Powell v. Seay, 553 P.2d 161, 164 (Okla. 1976);

Oregon - Rosacker v. Multnomah County, 43 Or. App. 583, 603 P.2d 1216, 1218 (1979);

Pennsylvania - Commonwealth ex rel. Saunders v. Creamer, 464 Pa. 2, 345 A.2d 702, 703 n.3 (1975);

Rhode Island - Carvalho v. Coletta, 457 A.2d 614, 617 (R.I. 1983);

Utah - Kish v. Wright, 562 P.2d 625, 627 (Utah 1977);

Washington - State v. Tidwell, 32 Wash. App. 971, 651 P.2d 228, 230 n.2 (1982);

West Virginia - Harrah v. Leverette, 271 S.E.2d 322, 332 (W.Va. 1980); and

Wyoming - Board of Trustees v. Holso, 584 P.2d 1009, 1017 (Wyo. 1978).